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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 60.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

against

CHARLES E. O'ROURKE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit
(January 12, 1953)

PETITION FOR REHEARING

RICHARD C. MACHCINSKI,
HERBERT ZELENKO,
Attorneys for Respondent,
Petitioner herein.
One Park Place,
New York 7, N. Y.

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GROUNDS FOR REHEARING

The Court's decision disregards the constant and established intent of Congress to enact those remedial statutes most reasonably beneficial to injured employees; whereas in the past this Court has constantly given such statutes liberal construction.

Congress enacted the *Federal Employers' Liability Act*, 45 U. S. C. A. Sec. 51 et seq., the *Safety Appliance Acts*, 45 U. S. C. A. Sec. 1 et seq., and the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. C. A. Sec. 901 et seq., for the benefit of injured employees and as a deterrent against the use of unsafe equipment and unsafe methods.

Operational railroading is an employment which is dangerous and hazardous. This is particularly true of the work of a brakeman, which was the respondent's occupation here. This Court has constantly recognized this situation and has always liberally construed those Acts pertinent to the business of railroading. See *Urie* v. *Thompson*, 337 U. S. 163, 181-182 and *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481, 486. By its decision in this case the Court has now replaced, for a large body of railroaders, the substantial benefits of the Liability Act with the comparatively meager benefits of the Compensation Act. Mute evidence of the comparative benefits involved is the strong opposition interposed by the petitioner to the claim herein.

Perhaps more important is the fact that as a result of the decision herein the Safety Appliance Acts no longer are applicable to cars and equipment over navigable waters. When it is contemplated that the deterrent factor represented by these Acts is thus nullified the effect is startling indeed. It will make the already dangerous occupation of railroading even more fortuitous. Such a result is difficult to reconcile with the adamant position taken by the Court in regard to the comprehensive applicability of the Safety Appliance Acts in *Coray* v. *Southern Pac. Co.*, 335 U. S. 520.

That this Court has had the welfare and benefit of the injured employee constantly in mind, in reasonably interpreting the intent of Congress, is further evidenced by the result in *Davis* v. *Department of Labor*, 317 U. S. 249, *Bethlehem Steel Company* v. *Moore*, 335 U. S. 874, and *Kaiser Company* v. *Baskin*, 340 U. S. 886. In those cases, involving an apparent overlapping of federal and state compensation laws the Court recognized a twilight zone "whereby a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other." *Moore's Case*, 80 N. E. 2d at 484.

affirmed 335 U. S. 874. In effect the injured workman in this twilight zone may recover under either state or federal compensation law, regardless of the fact that he was injured over navigable waters. The obvious advantage being that he can choose that remedy which is most beneficial to him.

In the present case the Court holds that a line can be drawn marking the coverage between the federal acts involved. The clear inference is that this line is the geographical shoreline separating land from navigable waters. It would have been just as clear and as convenient for the Court to have used the same test in the *Davis* line of cases. It chose to hold that there was a twilight zone of employment and "recognized the futility of attempting to reason logically about 'illogic'." *Moore's Case*, supra. In this case too there is a twilight zone, for "a reasonable argument can be made either way" in regard to whether moving loaded (or unloaded) freight cars from a float is the employer's maritime employment or its railroad employment, no consideration being given to the employee's actual duties in relation thereto. The sole reason for existence of the car float is the transportation of railroad cars in interstate commerce. Once the car float is moored it has fulfilled its purpose—the employer's maritime service. The movement of the cars off the float is then the railroad employment of the employer. Though opinions may differ this is, at the very least, a reasonable argument.

For these reasons it is urged that respondent (petitioner herein) be granted a rehearing in order to present his argument that a twilight zone exists in this type of case as in the *Davis* line of cases; and that the interests of justice and the intent of Congress will best be served by affording this employee his choice of remedies. Of the thirteen jurists who have passed on this case since its inception in the District Court, seven have decided one way and six the other. This sharp division of opinion itself supports respondent's contention herein that a twilight zone does in fact exist in this and similar cases.

Certificate of Counsel

Counsel for respondent (petitioner herein) certify that the within petition for rehearing is presented in good faith and not for delay.

Respectfully submitted,

RICHARD C. MACHCINSKI,
HERBERT ZELENKO,
Attorneys for Respondent.

New York, N. Y. January 23, 1953.